No.————

IN THE

Supreme Court of the United States

October Term, 1944.

JOHN WILLARD THOMPSON AND ANGY THOMAS CASTEN,
Petitioners

VERSUS

UNITED STATES OF AMERICA,
Respondent

SUPPORTING BRIEF

To the Honorable The Supreme Court of the United States:

In support of their petition for writ of certiorari your petitioners respectfully show to the court:

1.

OPINIONS OF THE COURT BELOW

The District Court filed no opinion in the case.

2.

(a) The opinion of the United States Circuit Court of Appeals, for the Fifth Circuit, may be found at page 66 of the transcript.

(b) The opinion of the United States Circuit Court of Appeals, for the Fifth Circuit, was handed down on December 9, 1944 (Tr. 66); the court rendered no opinion on petition for rehearing, but overruled same on January 13, 1945.

JURISDICTION OF THE COURT

Jurisdiction of this court is invoked upon the following grounds:

This case originated in the District Court of the United States, for the Northern District of Texas. From judgment and a sentence of guilt imposed upon them by that court they duly appealed to the United States Circuit Court of Appeals for the Fifth Circuit; thereupon this cause being affirmed by said court, they filed their petition for rehearing, which was also overruled.

Jurisdiction of this case is conferred upon the Supreme Court of the United States by Section 347-a, U. S. C. A., Title 28, and is sanctioned by subsection 3 of paragraph 5 (d) of Rule 38 of the Supreme Court of the United States.

STATEMENT OF THE CASE

On January 24, 1944, an indictment in two counts was returned against your petitioners and others into the District Court of the United States, for the Northern District of Texas. The first count charged petitioners and others with having received and concealed goods and chattels consisting of five hundred cases of whiskey of the approximate value of $17,100.00, which had theretofore been stolen from an interstate shipment of freight moving from the State of Illinois to the State of New Mexico. The second count charged petitioners and others with having conspired to so receive and conceal such stolen merchandise, knowing the same to have been stolen.

On the 28th day of January, 1944, this cause was tried and petitioners were found guilty on each of said counts, and the court sentenced each of them to serve five years generally in a United States penitentiary to be selected by the Attorney General (Tr. 15-17). Petitioners seasonably perfected their appeal to the United States Circuit Court of Appeals for the Fifth Circuit, and on December 9, 1944, the cause was affirmed by said court (Tr. 66). They filed their petition for rehearing January 5, 1945, which was by said court overruled January 13, 1945, without written opinion (Tr. 74).

ASSIGNMENT OF ERRORS

1

At the close of the Government's case, which said motion was seasonably renewed when the defendants had rested, and when the case was closed, petitioners moved for an instructed verdict of not guilty, for the reason that the evidence was insufficient to support a verdict of guilty or to be submitted to the jury. This motion was overruled, to which petitioners then and there, in each instance, excepted. They seasonably assigned such action on the part of the Court as such prejudicial error as would require the reversal of this cause, as they, likewise, here and now assign and contend.

2

The Court erred in not charging the jury, as seasonably requested by petitioners, that the Government relied upon circumstantial evidence for a conviction of the petitioners on each count of the indictment (Tr. p. 60).

3

It was obvious error, materially affecting a fundamental right of petitioners, and should be noted by this Honorable Court, although no exception was taken to such action at the time, for the Court to have charged the jury:

> "So now, gentlemen, in the light of these instructions, if you believe that on or about the time stated

in the indictment that these defendants who have entered their pleas of not guilty did, as charged in the indictment, conceal the whiskey set forth in such charge, as therein presented, and you believe and find such to be true from the evidence beyond a reasonable doubt, it would be your duty to convict the said defendants. If you have a reasonable doubt, you will acquit them.

"On the second count, you will apply the same test as to the conspiracy in the light of the other instructions given to you" (Tr. 59).

Because the court did not further charge the jury that they must believe beyond a reasonable doubt that the petitioners knew the whiskey had been stolen at the time they so received and concealed it before they could convict them.

QUESTIONS PRESENTED

1

Whether the evidence was sufficient to support a conviction.

2

Whether the evidence was such as to require a charge upon circumstantial evidence upon the entire theory of guilt.

3

Whether the failure of the court to charge the jury that they must first believe the petitioners knew the whiskey which they were charged with having received and concealed had been stolen before they could convict them is error of such fundamental and obvious nature and so harmful to the fundamental rights of petitioners as to permit and require this Honorable Court to take cognizance of it.

BRIEF OF THE ARGUMENT UNDER QUESTION 1, GERMANE TO ASSIGNMENT OF ERROR NO. 1

The offenses here charged grew out of an isolated transaction, and petitioners urge that unless the proof offered by the government meets all the necessary elements required to convict on the count of conspiracy the conviction on both counts must fail.

The evidence is undisputed that Duane Smith, who entered his plea of guilty and is not involved in this petition, by agreement with Mae Hatch, another defendant who also pleaded guilty, and likewise not here involved, brought the whiskey to her house, by himself, in a truck and trailer the early morning of November 15th, 1943 (Tr. 23). That Smith was acting alone, in that he told her (Mae Hatch) that he had to get rid of the truck; that Smith had her to follow him out the Garland highway,

where he turned off the road to the left; that she pulled up to the side of him, where he abandoned the truck and got into the car with him; that she brought him back to Forrest and Ervay Streets in Dallas, where he got out and told her the car across the street was his; and she later returned and the car was gone. There was no evidence that there was any one else in, following, or near the truck at the time it came or when it was in transit. Likewise we must presume, there being no evidence to the contrary, that there was no one in or around Smith's car at Ervay and Forrest Streets where she let Smith out (Tr. 23-24).

Mae Hatch further testified that Smith returned later with two men who brought the whiskey from the yard where Smith had unloaded it into her house; she later learned the two men were petitioners, Casten and Thompson; "that Smith didn't help much in bringing in the whiskey; that he had sprained his ankle before he got out there that night and was hobbling around with it" (Tr. 24). Mae Hatch evidently knew more about the transaction than she confessed. She knew about the sprained ankle and when it happened, and it is the theory of petitioners that this was a transaction of Mae's and Smith's, and that the whiskey was to be disposed of by the defendant, Houston Willis (Jack) Perry, an acquaintance and associate of Mae's, who owned liquor stores (Tr. 24), and who "was at her house on an average of once per week" and that he had been in her house often, but she does not know

how many times (Tr. 25); "that after she moved away she talked to Perry about going there and getting some of the whiskey and marketing it; that he took seven cases; that she was there when he took it. That he came twice for whiskey and she was there both times" (Tr. 25). She further testified that no one else got whiskey there (Tr. 25). Duane Smith and wife, too, were "business acquaintances" of Perry (Tr. 26). There is no evidence that either of the petitioners ever got any of the whiskey, or had anything else to do with it except to unload it. Mae Hatch testified that Casten came out there a good many times, but there is no evidence that he came out there for any business concerning the whiskey (Tr. 26).

The only other evidence offered by the government upon which they rely to connect the petitioners with this transaction is:

(1) R. B. Mays testified (Tr. 27-28) that he knows Casten when he sees him; witness lived at Bon Air Courts and had seen him there; that on last November, he does not know the exact date, thinks it was about November 24th, 4:30 in the morning, he went to Ambassador Hotel, picked Smith and Casten up, took Casten home, and then he and Smith went home. It will be recalled that the whiskey was unloaded at Mae Hatch's house November 15th, 1943 (Tr. 23).

(2) D. C. Gustafson, an agent of the Federal Bureau of Investigation, testified (Tr. 41-42) that Casten told

him a man knocked on his door the night of November 14th, the early morning of the 15th, and told him (Casten) that he knew of two or three hundred cases of whiskey, and there was a good opportunity to steal it; and that on another occasion he talked to Casten and Casten told him that there was a man in the case that thought he was getting gypped (Tr. 43).

On the other hand, supporting petitioners' theory of innocence, the evidence shows that Mae Hatch decided the whiskey was "hot" and told Duane Smith to move it (Tr. 25). That Harold Coffee, a brother-in-law of Duane Smith, an engineer of the S. W. Bell Telephone Company, and evidently an intelligent and educated man, testified that Duane approached him on November 21st and asked him if he could use his garage; that he assented, and that on the early morning of the 23rd, Duane came with a truck load of whiskey (the truck was identified as belonging to Jack Stanley) which had been borrowed by Tommie Garner (Tr. 28-29). Mildred Sistrunk's testimony (Tr. 29-30); that Coffee further testified that a man whom he had never seen before came with Smith in the (Stanley) truck (Tr. 31). The second night, there were three different cars that came with whiskey besides a bobtail fruit truck, and that Smith drove all three of them to his house and unloaded whiskey (Tr. 32).

Had petitioners been interested in the whiskey surely they would have done more than to help move it into the

house at Mae Hatch's house after Smith had unloaded it there. Surely they would have been interested in moving it, and if they had had any connection with or interest in it, Smith would have demanded their assistance in moving it. To assist in this unloading of a quantity of liquor, the possession of which is now legal under both the laws of the United States and of the State of Texas, certainly could be no evidence of even a persuasive nature that petitioners knew that it was stolen.

Of course petitioners realize the burden that would be theirs had the whiskey been found or proven to have been in their possession. We have no such burden here. Duane Smith brought it to Mae Hatch's house and unloaded it (Tr. 23). Duane Smith and another (whom the government contends is Tommy Garner) moved it from the home of Mae Hatch to the garage of Harold Coffee (Tr. 31). Mae Hatch and Duane Smith sold seven cases of it to Perry (Tr. 25). The simple act of helping one, on what basis there is no evidence, move stolen goods from the yard to the house of Mae Hatch, could, in no stretch of law or fact, constitute the petitioners possessors of it. The theory of innocence extends to every essential element of a case sought to be proven. We must presume that petitioners did not know the whiskey had been stolen as alleged, and all facts point to the fact that their services had been merely engaged to move the whiskey from the yard to the house "after Duane Smith's ankle had been sprained earlier that night".

Petitioners contend that under three outstanding cases decided by the court below, and certiorari denied, and followed and cited by practically every Circuit, *Kassin vs. United States*, 87 F (2), 183; *Copeland vs. United States*, 90 F (2), 78; and *Cooper et al. vs. United States*, 91 F (2), 195, this case should be reversed on account of the insufficiency of the evidence.

In the Kassin case, supra, after reviewing the facts sought to be proven, the opinion by Judge Hutcheson said:

> "In each case, however, where the evidence is purely circumstantial, the links in the chain must be clearly proven, and taken together must point not to the possibility or probability, but to the moral certainty of guilt. That is, the inference which may reasonably be drawn from them as a whole must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence." Citing Paddock vs. U. S., 79 F. (2) 872; DeLuca vs. U. S., 298 F. 412; Wright vs. U. S., 227 F., 885, 857.

In *Copeland vs. United States*, supra, the opinion by the late and revered Judge Foster said:

> "The case presents purely a question of fact. Conceding a case may be established by circcumstantial evidence, the rule is, in order to support a conviction, the conclusion to be drawn from circumstantial evidence must exclude every other reasonable hypothesis than that of guilt."

In *Cooper vs. United States*, supra, the opinion by Judge Sibley said:

> "But the evidence is insufficient as to Cromier. He bought an abundance of material (for the manufacture of intoxicating liquor), and had a boiler made, and no doubt was engaged in distilling, but he is not connected with any direct evidence with the operation of the Coopers, and the only circumstances connecting him with them are that he sent by Will Cooper the money to pay for making the copper boiler, and that the Coopers ran a copper still made by the same man. * * * He was entitled to an instructed verdict of not guilty."

In *United States vs. Silvia*, 131 F (2), 247, by the Seventh Circuit, and citing *Kassin vs. United States* and *Copeland vs. United States* supra, and *Shamburger vs. United States*, 99 F (2), 957, of the Eighth Circuit Court, in its opinion by Judge Chase, the court said:

> "The government merely fails in its proof when its evidence but creates a sort of mystery as to when one guess is as good as another."

We contend that to guess that petitioners were merely hired to help move some whiskey by a crippled man from the yard to the house, believing that his possession of it was perfectly legal, is as good as to guess that they were participating in a crime of which they were cognizant.

UNDER QUESTION NO. 2, GERMANE TO ASSIGNMENT OF ERROR NO. 2

As so above briefly stated, we contend that all of the evidence offered by the Government as to petitioners' guilt

was purely circumstantial. The only thing that could have possibly taken this case out of that category would have been by some act or declaration of the petitioners. We urge that, the whiskey having been in the actual and constructive possession of Duane Smith and Mae Hatch before petitioners ever showed up on the scene, the mere fact that they assisted Duane Smith, who had been incapacitated by having a sprained ankle, move the whiskey from the yard to the house certainly would not constitute them in such possession of recently stolen goods as to require them to give an explanation. The only statement made by either of them was that testified to by the witness, D. C. Gustafson (Tr. 38-42), where he testified that Casten told him a man had awakened him at his home the early morning of the 15th, and told Casten where some whiskey was that could be stolen. If this testimony has any probative force at all, it could be only circumstantial. We contend that the statement is most unreasonable, even as a circumstance, and should be viewed by this Honorable Court, as it always has been, with care and caution.

Then, if the case is one depending entirely on circumstantial evidence, a jury of laymen were calculated to have been confused and misled by the Court's action, after being requested to charge that the case as a whole depended upon circumstantial evidence, in reiterating, amounting to emphasis, his charge "that the government relies in part upon circumstantial evidence for a conviction in this case; and particularly does it rely on such in

the second count * * *" (Tr. 61). We contend, then, earnestly, that Mae Hatch, Duane Smith, James Harold Coffee and Houston Willis Perry, the only ones who ever had possession of any of the stolen whiskey, having already entered their plea of guilty, and their participations in the crime not being an issue for the jury to decide, the government had to rely in whole and not in part on circumstantial evidence for conviction of petitioners.

UNDER QUESTION NO. 3, GERMANE TO ASSIGNMENT OF ERROR NO. 3

Neither of counsel here appearing for the petitioners represented them at their trial, and what is here said is not meant by them to constitute any reflection upon counsel that did. However, we feel that assignment of error No. 3, here brought forth, is of such nature as that our plain duty is to here urge it. No exception was taken to the matters here complained of, nor was it brought up in the assignment of errors. Neither can we speculate upon what the learned Trial Court, whose entire record is one of emphasized fairness, would have done had it been properly called to his attention. The fact remains we consider it error of such harmful and obvious nature this Honorable Court will take cognizance of it under:

United States vs. Atkinson, 297 U. S. 157, 80 L. Ed., 555;

N. Y. Cent. RR. Co. Case, 318 U. S. 320, 73 L. Ed. 711;

Brookfield vs. U. S., 272 U. S. 448, 450, 71 L. Ed., 345, 346;

Annotation of this Point, 14 L. Ed., 643;

Hayes vs. U. S., 112 F (2) 676;

Benson vs. U. S., 112 F (2) 422;

McAffee vs. U. S., 105 F (2) 21;

Harmon vs. U. S., 99 F (2) 933;

Meadows vs. U. S., 82 F (2) 881;

Thomas vs. D. C., 90 F (2) 424;

Genatos vs. U. S., 104 F (2) 929.

The cases above cited hold, as is well settled, and the doctrine there announced has been repeatedly approved by this Honorable Court, especially in criminal cases, that where an error is obvious and calculated to seriously affect the rights of a litigant, it is not only the privilege, but the duty of, Appellate Courts to correct such errors.

It is fundamental that before one can be convicted for receiving and concealing stolen property, he must receive and conceal it knowing it to be stolen. *Degan vs. U. S.*, 271 F. 291; *Wolf vs. U. S.*, 290 F. 738; *U. S. vs. Russo*, 123 F. (2) 420.

The Court charged the jury in this case:

> "So now, gentlemen, in the light of these instructions, if you believe that on or about the time stated

in the indictment that these defendants who have entered their pleas of not guilty did, as charged in the indictment, conceal the whiskey set forth in such charge, as therein presented, and you believe and find such to be true from the evidence beyond a reasonable doubt, it would be your duty to convict the said defendants. If you have a reasonable doubt, you will acquit them.

"On the second count, you will apply the same test as to the conspiracy in the light of the other instructions given you" (Tr. 59).

The Court did not here charge the jury that they must first believe, beyond a reasonable doubt, that the defendants must have known said whiskey was stolen before they could convict them for having concealed "the whiskey set forth in such charge". And in view of the entire charge we do not believe that the part of the above quoted charge to the effect that if the jury believed that the defendants "did, as charged in the indictment, conceal the whiskey set forth in said charge, as therein presented," is a sufficient charge on this point, especially in view of the fact the entire record adequately and without doubt shows the whiskey was stolen by some one from an interstate shipment. In view of this charge, coupled with the undisputed fact that the whiskey actually was stolen from an interstate shipment, the jury was most likely to have concluded that because any one touched it, that one was guilty.

In only one place in his charge did the Court call the jury's attention to this fact, and that was in reference

to the second or conspiracy count of the indictment, and this certainly could not be considered as charging the jury upon this fundamental prerequisite of conviction. In the second paragraph of the charge found on page 54 of the Transcript, the Court said:

> "There are two counts in the indictment. The second count charges a conspiracy and sets forth that on or about the 14th day of November, 1943, that the defendants above named did unlawfully, knowingly, and feloniously conspire, confederate and agree together, each with the other, to commit an offense against the United States, to-wit, to receive and conceal stolen goods taken in interstate commerce."

Just above this paragraph the Court charged the jury that the defendants did:

> " * * * unlawfully, wilfully, knowingly and feloniously receive and conceal certain goods and chattels consisting of some 500 cases of whiskey the exact value of which is to the grand jurors unknown, but of the approximate value of $17,168.00, which was being transported in interstate commerce, as alleged in the indictment."

The Court did not there charge that the whiskey was stolen from an interstate shipment, but merely stated that they received and concealed it while it was being transported in interstate commerce. Taken in connection with the Court's repeated statement in his charge, to-wit, "as charged in the indictment," we wish to respectfully call this Honorable Court's attention to the portion

of the Court's charge found near the bottom of page 57 of the Transcript, where it is stated:

> "This indictment was presented by the district attorney and the entire instrument will not be read to you at this time, you have already heard it read."

We contend that under no circumstances, and most certainly not under these, would a charge that if the jury believed the defendants received and concealed these goods "as charged in the indictment" they should convict be tantamount to the necessary charge that the jury must believe they received and concealed them, *knowing them to have been stolen.*

It cannot be said, we earnesly contend, that either of the errors assigned was not, to say the least, calculated to, and most likely did, prejudice the rights of petitioners, and, all taken together, certainly did. The 1st and 3rd if error at all are fundamental. The harmful effects of the 2nd most likely had the same effect. The 1st and 2nd were properly preserved by exceptions at the proper time, although the 2nd was not brought up by proper assignment of error. We urge that the 3rd is of such obvious and fundamental nature as to challenge the attention of this Honorable Court as the Rules of this Court and the cases above cited permit and require.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue to the Honorable The United States Circuit Court of Appeals, for the Fifth Circuit,

commanding the court to certify to this court for its review and determination on a day certain a full and complete transcript of the record and proceedings in the cause numbered and entitled on its docket: No. 10949, John Willard Thompson and Angy Thomas Casten, Appellants, versus United States of America, Appellee, and that the judgment of the Circuit Court of Appeals and that of the trial court be reversed and this cause remanded, and for such other orders as may to this Honorable Court be deemed just and proper.

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